PENALTY CALCULATION METHODOLOGY
FOR THE
HILBERS NEW HOME COMMUNITIES LP
TIMBERWOOD ESTATES
NEVADA COUNTY

The State Water Board's *Water Quality Enforcement Policy* (Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code section 13385(e). Each factor of the nine-step approach is discussed below, as is the basis for assessing the corresponding score. The Enforcement Policy can be found at: Enforcement Policy.

VIOLATION 1 – FAILURE TO IMPLEMENT BAT/BCT BMPS

During site inspections on 28 September 2018, 29 November 2018, 9 and 18 January 2019, 14 February 2019, and 26 February 2019 Board Staff observed that the Project did not have best management practices (BMPs) that met the Construction General Permit's requirements. Dischargers in all Risk Levels are required to implement BMPs that minimize or prevent pollutants in storm water discharges using the best available technology economically achievable (BAT) for toxic pollutants and non-conventional pollutants and best conventional pollutant control technology (BCT) for conventional pollutants, also referred to as the BAT/BCT standard. During the 29 November 2018 inspection, Board staff collected a storm water discharge sample that had a measured turbidity of over 1,000 Nephelometric Turbidity Units (NTU), well above the Construction General Permit's 250 NTU Numeric Action Level. A second discharge sample was taken by Board staff during the 14 February 2019 inspection which had a turbidity over 250 NTU indicating that the Project's BMPs were still not in compliance with the BAC/BCT standard. Discharge of storm water from a construction site without implementation of BMPs that meet the BAT/BCT standard is a violation of the Construction General Permit. The Effluent Standards in Attachment D, section A.1.b of the Construction General Permit state: *Dischargers shall minimize or prevent pollutants in storm water discharges and authorized non-storm water discharges through the use of controls, structures, and management practices that achieve BAT for toxic and non-conventional pollutants and BCT for conventional pollutants.*

Table 1: Violation 1 Penalty Factors and Discussion

PENALTY FACTOR	VALUE	DISCUSSION
Physical, chemical, biological, or thermal characteristics of the discharge	2	Discharges of turbidity can cloud the receiving water (which reduces the amount of sunlight reaching aquatic plants), clog fish gills, smother aquatic habitat and spawning areas, and impede navigation. Sediment can also transport other materials such as nutrients, metals, and oils and grease, which can also negatively impact aquatic life and aquatic habitat.

PENALTY FACTOR	VALUE	DISCUSSION
Harm or potential for harm to beneficial uses	2	Discharge from the Project flows to Olympia Creek which flows to Wolf Creek which discharges to the Bear River. The Wolf Creek watershed is designated by the State Water Board as a high receiving water risk watershed. The beneficial uses of the Bear River include aquatic freshwater habitat and wildlife habitat. Board staff collected storm water discharge samples from the Project on 29 November 2018 and 14 February 2019 that had measured turbidity over 1,000 NTU and over 250 NTU, respectively. Due to the dilution expected between the discharge locations and water bodies with beneficial uses, the discharge was expected to have a below moderate impact to beneficial uses, likely to cause harm in the short term but not appreciable harm in the long term.
Susceptibility to cleanup or abatement	1	The sediment from the turbid discharge was deposited over a long distance and cleanup or abatement of 50% or more of the material would not be possible.
Per gallon and per day factor for discharge violations	0.10	The “Deviation from Requirement” is moderate because the Discharger did not implement several requirements of the General Permit rendering the permit’s BAT/BCT effluent standard partially compormised. The value of 0.10 was determined from Table 1 of the Enforcement Policy.
Volume discharged	n/a	The Prosecution Team did not calculate the volume of discharge at this time. The Prosecution Team reserves the right to assess penalties for the volume discharged if this matter proceeds to hearing.
Adjustment for high volume discharges	n/a	The Prosecution Team did not calculate the volume of discharge at this time. The Prosecution Team reserves the right to assess penalties for the volume discharged if this matter proceeds to hearing.

PENALTY FACTOR	VALUE	DISCUSSION
Days of discharge	25	According to NOAA rainfall data from station "Grass Valley Number 2, CA US USC00043573", there were a total of 25 days of rainfall over ½" between the first Water Board inspection on 28 September 2018 and 26 February 2019. Board Staff alleges that runoff was generated at the Project on days where over ½" of rain was recorded at the nearby weather station. An active treatment system was installed on 26 February 2019 and turbid discharges from the Project ceased after that date. Board staff alleges that discharges from the Project occurred on 25 days during this period when BMPs did not meet the Construction General Permit's BAT/BCT standard.
Initial Liability for Violation #1	$25,000	The liability is calculated as per day factor multiplied by the number of days multiplied by the maximum liability per day ($10,000/day).
Adjustment for Discharger Conduct Culpability	1.3	The Discharger has applied for and received permit coverage under the General Permit for numerous construction sites in California. The Discharger also retained a QSD and QSP that are aware of the Construction General Permit's BMP requirements. Therefore, the Discharger should be aware of the General Permit's requirements and should have implemented its SWPPP.
Adjustment for Discharger Conduct History of Violations	1.0	Board staff are not aware of previous violations by the Discharger related to the General Permit. Therefore, a neutral factor of 1.0 is appropriate.
Adjustment for Discharger Conduct Cleanup and Cooperation	1.1	Incremental improvements were observed during Board staff's follow-up inspections; however, it took several months before BMPs in compliance with Construction General Permit requirements were installed at the Project and in place during rain events. Therefore, Board Staff is applying a cleanup and cooperation factor of 1.1 for this violation.
Total Base Liability for Violation #1	$35,750	The base liability is calculated as the initial liability multiplied by each of the above three factors.

VIOLATION 2 – FAILURE TO IMPLEMENT APPROPRIATE EROSION CONTROL BMPS

During the Water Board Staff site inspection on 28 September 2018, Board staff observed that no erosion control BMPs were installed on disturbed soils at the Project. During a follow-up inspection conducted during a rain event on 29 November 2018, Board staff observed that effective erosion control BMPs, such as straw or hydraulic mulch, were not installed or planned for active construction areas. Following the rain event on 25 February 2019, the Discharger began the installation of an active treatment system. The Prosecution Team alleges that failure to implement appropriate erosion control BMPs during the rain events that occurred between 28 September 2018 and 25 February 2019 is a violation of the General Permit. Attachment D, section E.1 in the General Permit states in part: *Risk Level 2 dischargers shall implement appropriate erosion control BMPs (runoff control and soil stabilization) in conjunction with sediment control BMPs for areas under active construction.* Areas under active construction are defined in the General Permit as areas undergoing land surface disturbance, including construction activity during the preliminary stage, mass grading stage, streets and utilities stage and the vertical construction stage.

Table 2: Violation 2 Penalty Factors and Discussion

PENALTY FACTOR	VALUE	DISCUSSION
Discharge violations	n/a	This step is not applicable because the violation is not a discharge violation.
Potential for harm	Moderate	The failure to install appropriate erosion controls led to the discharge of turbid, sediment laden water. Discharges of sediment can cloud the receiving water (which reduces the amount of sunlight reaching aquatic plants), clog fish gills, smother aquatic habitat and spawning areas, and impede navigation. Sediment can also transport other materials such as nutrients, metals, and oils and grease, which can also negatively impact aquatic life and aquatic habitat.
Deviation from requirement	Moderate	The “Deviation from Requirement” is moderate because the requirement was partially compromised by not installing erosion control BMPs on all disturbed soil areas prior to a storm event rendering this requirement partially ineffective.
Per day factor	0.35	Determined from Table 3 in the Enforcement Policy. The middle value was chosen at this time.

PENALTY FACTOR	VALUE	DISCUSSION
Days of violation	25	Although the Discharger is in violation of this requirement for all days that rainfall was recorded between 28 September 2018 and 26 February 2019, Water Board staff is electing to only assess penalties for for days where rainfall exceeded ½" and caused runoff. As explained in Violation #1 above, there were 25 days of rainfall that exceeded ½" during this period.
Initial Liability for Violation #2	$87,500	The liability is calculated as per day factor multiplied by the number of days multiplied by the maximum liability per day ($10,000/day).
Adjustment for Discharger Conduct Culpability	1.3	The Discharger has applied for and received permit coverage under the General Permit for numerous construction sites in California. The Discharger also retained a QSD and QSP that are aware of the Construction General Permit's BMP requirements. Therefore, the Discharger should be aware of the General Permit's requirements and should have implemented its SWPPP.
Adjustment for Discharger Conduct History of Violations	1.0	Board staff are not aware of previous violations by the Discharger related to the General Permit. Therefore, a neutral factor of 1.0 is appropriate.
Adjustment for Discharger Conduct Cleanup and Cooperation	1.1	Incremental improvements were observed during Board staff's follow-up inspections; however, it took several months before BMPs in compliance with Construction General Permit requirements were installed at the Project and in place during rain events. Therefore, Board Staff is applying a cleanup and cooperation factor of 1.1 for this violation.
Total Base Liability for Violation #2	$125,125	The base liability is calculated as the initial liability multiplied by each of the above three factors.

OTHER FACTOR CONSIDERATIONS

Total Base Liability for all violations is $160,875. The Enforcement Policy states that five other factors must be considered before obtaining the final liability amount

Table 3: Other Factor Considerations for Final Liability Amount

OTHER FACTORS	VALUE	CONSIDERATIONS
Ability to pay and continue in business	No adjustment	Board staff does not have information suggesting that the Discharger cannot pay the proposed penalty and continue in business.
Economic benefit	$31,008	Board staff estimated the economic benefit for each violation. Avoided and delayed costs are considered when calculating the economic benefit. The economic benefit for these violations was assumed to be negligible due to the short duration of the Project. See the attached Economic Benefit spreadsheet for details.
Other factors as justice may require	No adjustment	The costs of investigation and enforcement are “other factors as justice may require” and could be added to the liability amount. The Central Valley Water Board has incurred over $5,000 in staff costs associated with the investigation and enforcement of the alleged violations. While this amount could be added to the penalty, it is not added at this time.
Maximum liability	Over $500,000	Based on California Water Code section 13385, the maximum liability is $10,000 per day per violation and $10 per gallon. The Prosecution Team reserves the right to include the volume discharged in the penalty calculation should this matter proceed to hearing.
Minimum liability	$34,109	Based on California Water Code section 13385, civil liability must be at least the economic benefit of non-compliance. Per the Enforcement Policy, the minimum liability is to be the economic benefit plus 10%.
Final Liability	**$160,875**	The final liability amount is the total base liability plus any adjustment for the ability to pay, economic benefit, and other factors. The final liability must be more than the minimum liability but cannot exceed the maximum liability.